



Jubilee Insurance Company Limited v Githinji; Kabia & another (Interested Parties) (Suing as the Administrators of the Estate of Benson Ngugi - Deceased) (Civil Suit 311 of 2011) [2023] KEHC 3852 (KLR) (Civ) (3 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 311 OF 2011

JN MULWA, J

MAY 3, 2023

BETWEEN

THE JUBILEE INSURANCE COMPANY LIMITED PLAINTIFF

AND

FRANCIS MURIITHI GITHINJI DEFENDANT

AND

ANN MUMBI KABIA INTERESTED PARTY

ARTHUR GAKERI NJERI INTERESTED PARTY

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF BENSON NGUGI -
DECEASED**

JUDGMENT

1. This suit arose from an Insurance Contract between the Plaintiff and the Defendant. The brief facts of the case are that on 2/2/2009, the Defendant approached the Plaintiff for an insurance cover for his motor vehicle registration number KAY 458E. The Defendant filled, signed and delivered to the Plaintiff a private car proposal and declaration form in which he indicated that the said motor vehicle would be used exclusively for social, domestic and pleasure purposes. The Plaintiff thus insured the Defendant's motor vehicle under an Insurance Policy No. P/NRB/2010/2009/35039.
2. On 22/1/2010 and 12/3/2010, the Plaintiff received Statutory Notices from the Estates of two deceased's persons namely Benson Ngugi and Eunice Mweni respectively, informing it of their intention to institute suits to recover damages, costs and interest arising from a road traffic accident that occurred on 10/10/2009 along Mombasa - Nairobi Highway, involving the Defendant's insured



motor vehicle. The Plaintiff's investigations on the circumstances of the accident revealed that at the time of the alleged accident, the said motor vehicle was being used to carry passengers for hire and reward which was outside the terms of the policy. In the circumstances, the Plaintiff contended that the insurance policy was obtained through misrepresentation of facts as well as non-disclosure and concealment of material facts by the Defendant.

3. In the Plaint dated 22/7/2011, the Plaintiff sought judgment against the Defendant for:
 - a. A declaration that the Plaintiff is not liable to indemnify the Defendant against any claim whatsoever and to satisfy any judgment that may arise from the accident which occurred on 10th October 2009 involving the Defendant's motor vehicle registration KAY 458E.
 - b. A Declaration that the Policy of Insurance in respect of Motor vehicle registration no. KAY 458E was obtained by non-disclosure of material facts by the Defendant and/or by misrepresentation of fact by the Defendant which was false and the Plaintiff is entitled to avoid the Policy.
 - c. The costs of the suit together with interest thereon at Court rates from the date of judgment until payment in full.
 - d. Such other or further relief that this honourable court may deem fit to grant.
4. The Defendant did not enter appearance nor file a Defence to the claim. As such, the Plaintiff lodged a Request for Judgment on 21/10/2011 and an interlocutory judgment was duly entered.
5. Thereafter, the matter proceeded to formal proof whereupon the Interested Parties applied to be enjoined to the suit before the close of the Plaintiff's case which was duly allowed. The Interested Parties then filed a Statement of Defence dated 4/8/2021 contending that the Plaintiff is not entitled to avoid the Insurance Policy in as far as Machakos CMCC No. 791 of 2010 - Anne Mumbi Kabia & Athur Gakere Njeri (Suing as the administrators of the Estate of Benson Ngugi [Deceased]) v Bangladesh Japan International (Kenya) Limited, Francis Githinji and Arbanus Mutuku Kimatu is concerned.
6. The Plaintiff's sole witness PW1, Gideon Chacha, a Recovery Officer from the Plaintiff's company adopted his statement filed on 5/8/2011 as part of his evidence in chief and produced the Plaintiff's Bundle of Documents in support of the Plaintiff's case. His testimony was that upon filling the proposal and declaration form, the Defendant paid a premium of Kshs. 20,130/- in cash and was issued with a receipt. He paid for one year and they issued him with a Certificate of Insurance No. C5779544 as proof that the cover was effective. The full payment was made on 27/2/2009.
7. On receipt of the notices of institution of suits arising from the road accident of 10/10/2009 from the advocates for deceased persons, the Plaintiff appointed Invespot Insurance Investigators to determine the circumstances of the accident as the insured had not reported any accident. The investigator found out that on the material date of the accident, the insured motor vehicle was being driven by one Dr. Albanus Mutuku Kimeu who had hired it from one Mr. Martin, a taxi operator in Kitengela town for a one day self-drive at Kshs. 2,500/- to attend his cousin's wedding. The motor vehicle was not covered for commercial purposes or hire.
8. The Interested Parties did not call any witness to testify in this case.
9. The Plaintiff filed extensive written submissions on the suit whilst the Interested Parties did not file any despite having been granted adequate time and opportunity to do so by the court.



Analysis and Determination.

10. Upon careful consideration of the pleadings and documents on record, the evidence adduced and submissions by the Plaintiff, the court flags out issues for determination as:-

- a. Whether motor vehicle registration number KAY 458E was being used for the purpose within the terms of the Insurance Policy issued by the Plaintiff at the time of the road accident that occurred on the 10/10/2009; and,
- b. Whether the Plaintiff is entitled to the orders sought in the plaint.

Issue no.(a);

It is trite law that he who alleges must prove. This principle is buttressed by Section 107 of the Evidence Act Cap 80 Laws of Kenya which provides:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

11. Section 109 of the same Act provides:-

“109 Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

12. On the first issue, the Plaintiff adduced in evidence a copy of the Proposal and Declaration form (Page 3 - 5 of the Plaintiff's Bundle of Documents) filled and signed by the Defendant on 27/2/2009. The said Form being the basis of the insurance policy, contained a couple of questions to be answered. At part 8 of the Proposal, the Defendant clearly indicated that the car, which was a private vehicle would be used exclusively for social, domestic and pleasure purposes. He also declared and/or warranted (Page 5 of the Plaintiff's Bundle of Documents) that all the particulars stated therein were true and that he had not suppressed, misrepresented or misstated any material fact.

Relying on the said proposal and upon the payment of the requisite premium, the Plaintiff issued the Defendant with a Private Car Policy (Page 7 -19 of the Plaintiff's Bundle of Documents). The “Limitations as to Use” Clause in the Policy Document clearly explains that the Policy does not cover use for commercial travelling or carrying passengers for hire and reward.

13. The Plaintiff also produced to court an Investigation Report (page 30 – 63 of the Plaintiff's Bundle of Documents) from Invespot Insurance Investigators regarding the accident involving the Defendant's insured motor vehicle on the 10/10/2009. The uncontroverted evidence as per the Investigation Report is that on the material day the subject motor vehicle had been hired out to one Dr. Urbanus Mutuku Kimatu for a one day self-drive by a Mr. Martin who was a taxi operator within Kitengela town. Indeed, in a Statement attached to the Report (See page 44 of the Bundle), the said Dr. Urbanus clearly states that he hired the vehicle at Kshs. 2,500/- to attend his cousin's wedding in Sultan Hamud. The said Report (page 42 of Plaintiff's Bundle of documents) concluded that the insured vehicle was at the material time of the accident being used for hire and reward. In the circumstances, the court



finds that the Plaintiff has established on a balance of probabilities that the Defendant's motor vehicle registration number KAY 458E was not being used for the purpose within the terms of the Insurance Policy issued by the Plaintiff at the time of the road accident of 10/10/2009.

14. Is the Plaintiff entitled to the reliefs sought in the plaint?
15. Section 2 Clause 1 of the Policy document provided that the Company would indemnify the Defendant against all sums, costs and expenses that the Defendant would become legally liable to pay in respect of death or bodily injury to any person as well as damage to property arising out of an accident caused by or in connection with the insured motor vehicle. However, it is evident that the policy of insurance in the instant case was obtained through misrepresentation and non-disclosure of material facts by the Defendant. Indeed, there is no evidence that the Defendant, at any point in time, advised the Plaintiff of any intention to use the motor vehicle for purposes other than the ones declared in the proposal form.
16. The court finds persuasion in the case of *Charles Momanyi Mageto v Co-operative Insurance Company of Kenya Limited* [2016] eKLR. Where Majanja J. held that:

“The duty disclose material facts is a fundamental duty in an insurance contract. Once these facts, including the fact that the plaintiff had used the Vehicle for hire and reward contrary to the terms of the policy, came to the attention of the defendant, it was entitled to repudiate the contract (see *Day Break Ltd v The Monarch Insurance Co., Ltd* Milimani HCCC No. 225 of 2007 [2013] eKLR and *Heritage Insurance Co., Ltd v Alex Migore* ELD HCCC No. 173 of 2002(UR)).”
17. For the above reasons, the court finds that the Plaintiff has proved its claim on a balance of probabilities against the Defendant and the interested parties, and proceeds to make the following declarations that:-
 - a. The Plaintiff is not liable to indemnify the Defendant against any claim whatsoever and to satisfy any judgment that may be arising out of the accident which occurred on 10th October 2009 involving the Defendant's motor vehicle registration KAY 458E, including Machakos CMCC NO. 791 of 2010-*Ann Mumbi Kabia & another v Bagladesh Japan International (kenya)Limited & 2 others.*
 - b. The Policy of Insurance in respect of Motor vehicle registration no. KAY 458E was obtained by non-disclosure of material facts by the Defendant and/or by misrepresentation of fact by the Defendant which was false and the Plaintiff is entitled to avoid the Policy.
 - c. The court has considered the circumstances obtaining in this suit and is of the considered opinion that justice would be served by an order that each party bears own costs of the suit.Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY 2023.

JANET MULWA

JUDGE

